

Notice of Decision and Reasons for Decision

Applicant: 'EK4'
Agency: Yooralla
Decision date: 5 May 2022
Exemptions considered: Sections 30(1), 33(1), 25
Citation: 'EK4' and Yooralla (Freedom of Information) [2022] VICmr 122 (5 May 2022)

FREEDOM OF INFORMATION – workplace relations – workplace investigation – documents affecting personal privacy – internal working documents – workplace dismissal – employment terminated

All references to legislation in this document are to the *Freedom of Information Act 1982 (Vic)* (**FOI Act**) unless otherwise stated.

Notice of Decision

I have conducted a review under section 49F of the Agency's decision to refuse access to documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision.

While I am satisfied certain information in the documents is exempt from release under section 33(1), I am not satisfied the information is exempt under section 30(1).

As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt information deleted in accordance with section 25, access is granted in part.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

5 May 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to certain documents.
2. Following consultation with the Agency, the Applicant amended the terms of their request to:

Documents, including emails with my name about me concerning [number of] investigations into my performance and employment ...
3. The Agency initially identified 15 documents falling within the terms of the Applicant's request and granted access to 11 documents in full and refused access to four documents in part under sections 30(1) and 33(1).
4. The Agency did not provide the Applicant with a decision letter setting out the reasons for its decision, as required under section 27 and the FOI Professional Standards.

Applicant's concerns regarding adequacy of search and missing documents

5. Alongside their review application, the Applicant raised concerns regarding the Agency's handling of their FOI request, including possible missing documents given the lack of detail provided by the Agency to the Applicant about searches it conducted for the relevant documents.
6. In accordance with section 61B(3), the Applicant's concerns were dealt with as part of my review.
7. OVIC staff made enquiries with the Agency, which undertook an additional search for documents.
8. Following further document searches, the Agency located seven additional documents falling within the terms of the Applicant's request and released of copy of these documents in full. For completeness, they are listed in the Schedule of Documents in **Annexure 1** as Documents 20-26.
9. Having considered the information before me, and noting the additional documents identified by the Agency, I am satisfied the Agency has conducted a thorough and diligent search for relevant documents based on the terms of the Applicant's request.

Review application

10. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
11. The Applicant indicated they seek access to information about the reasons for the Agency's decision to stand them down from their employment and the subsequent process it followed.
12. I have examined a copy of the documents subject to review.
13. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
14. I have considered all communications and submissions received from the parties.
15. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.

16. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

Review of exemptions

Section 30(1) – Internal working documents

17. Section 30(1) has three requirements:
- (a) the document must disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister;
 - (b) such matter must be made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government; and
 - (c) disclosure of the matter would be contrary to the public interest.
18. Section 30(3) provides purely factual information is not exempt under section 30(1).¹

Do the documents disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister?

19. For the requirements of section 30(1) to be met, a document must contain matter in the nature of opinion, advice or recommendation prepared by an agency officer, or consultation or deliberation between agency officers.
20. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, the issue is whether release of the document would disclose matter of that nature.²
21. The Agency exempted from release under section 30(1) information recorded in incident reports relating to the Applicant's conduct leading up to changes being made to their employment. This information records the steps taken by the Agency in relation to its incident response protocols and does not reveal any preliminary steps or discussion which may have taken place prior to the creation of these records. I consider this information is not deliberative or consultative in nature, rather it is factual in nature and is not exempt from release by virtue of section 30(3). As such, I am satisfied these records are not exempt from release under section 30(1) as the elements under paragraph 17(a) and (b) above are not met.
22. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 30(1).

Section 33(1)– Documents affecting personal privacy of third parties

23. A document is exempt under section 33(1) if two conditions are satisfied:
- (a) disclosure of the document under the FOI Act would 'involve' the disclosure of information relating to the 'personal affairs' of a person other than the Applicant (a **third party**);³ and
 - (b) such disclosure would be 'unreasonable'.

¹ Section 30(3).

² *Mildenhall v Department of Education* (1998) 14 VAR 87.

³ Sections 33(1) and 33(2).

Do the documents contain personal affairs information of a third party?

24. Information relating to a person's 'personal affairs' includes information that identifies any person or discloses their address or location. It also includes any information from which such information may be reasonably determined.⁴
25. A document will disclose a third party's personal affairs information if it is capable, either directly or indirectly, of identifying that person. As the nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.⁵
26. The Agency released the majority of information in the documents describing factual events that have occurred.
27. The information the Agency determined was exempt from release contains the following information which I accept is personal affairs information for the purposes of section 33, as it could directly or be used to identify a third party or their location:
 - (a) the names, telephone numbers, locations and position titles of Agency officers;
 - (b) the name and address of a third party to which the Agency provided a service; and
 - (c) Agency generated incident ID numbers; and
 - (d) descriptions of events involving Agency officers and a third party that received services from the Agency.

Would disclosure of the personal affairs information be unreasonable?

28. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting the personal privacy of a third party in the particular circumstances.
29. In *Victoria Police v Marke*,⁶ the Victorian Court of Appeal held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others'. Further, the exemption under section 33(1) 'arises only in cases of unreasonable disclosure' and '[w]hat amounts to an unreasonable disclosure of someone's personal affairs will necessarily vary from case to case'.⁷ The Court further held, '[t]he protection of privacy, which lies at the heart of [section] 31, is an important right that the FOI Act properly protects. However, an individual's privacy can be invaded by a lesser or greater degree'.⁸
30. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances, I have considered the following factors:

⁴ Section 33(9).

⁵ *O'Sullivan v Department of Health and Community Services (No 2)* [1995] 9 VAR 1 at [14]; *Beauchamp v Department of Education* [2006] VCAT 1653 at [42].

⁶ [2008] VSCA 218 at [76].

⁷ *Ibid.*

⁸ *Ibid* at [79].

(a) The nature of the personal affairs information and the circumstances in which it was obtained

Personal affairs information of Agency officers

Whether the personal affairs information of agency staff is exempt under section 33(1) must be considered in the context of the particular circumstances of each matter.⁹ The Victorian Civil and Administrative Tribunal (VCAT) has accepted there is nothing particularly sensitive about matters occurring or arising out of the course of one's official duties.¹⁰

The names of those who directly observed incidents and conversations involving the Applicant would likely be known to the Applicant. While the names and position titles of the Agency officers, who were involved in a decision making capacity following the incidents, may not already be known to the Applicant, the documents record their involvement in the matter in a professional capacity. Therefore, I consider this information is less sensitive in nature.

Where the information records direct contact details, health information, information that is subjective in nature or information provided in confidence by Agency officers, I consider this information is more sensitive in nature.

Personal affairs information of a third party receiving services from the Agency

The documents also contain information about a third party who received services from the Agency, and record information about the provision of medical care to that person.

I consider there is an expectation of confidentiality in these circumstances and there is no information before me to suggest the third party provided consent for the release of their personal affairs information in the documents.

The Agency has already released some health information in relation to the third party, which I consider is personal affairs information capable of identifying them, particularly given the Applicant's knowledge of the events described. Given the sensitivity of the information, I consider release of the third party's name and address would be unreasonable as it would release an extract of their medical record and compromise confidentiality and their personal privacy.

(b) The Applicant's interest in the information

The FOI Act provides a general right of access that can be exercised by any person, regardless of their motive or purpose for seeking access to a document. However, the reasons why an applicant seeks access to a document is a relevant consideration in determining whether disclosure would be unreasonable under section 33(1).¹¹

I understand the Applicant seeks access to the information to better understand the decision-making process and procedure around the Agency's investigation into their conduct and the termination of their employment.

(c) Whether the individuals to whom the information relates object, or would be likely to object, to the release of the information

The Agency advised they could not confirm whether consultation had taken place prior to making the FOI decision. During the review process, the Agency submitted it was likely the

⁹ *Coulson v Department of Premier and Cabinet (Review and Regulation)* [2008] VCAT 229.

¹⁰ *Re Milthorpe v Mt Alexander Shire Council* (1997) 12 VAR 105.

¹¹ *Victoria Police v Marke* [2008] VSCA 218 at [104].

third parties would object to the disclosure of their personal affairs information and, as such, consultation was not practicable.

Given the sensitive circumstances of the matter, I accept it is likely both the Agency officers and any third party to whom the Agency provided services would object to the release of their personal affairs information under FOI.

(d) Whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person¹²

In determining whether the disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, I must consider whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.¹³

There is no information before me to suggest that this is a relevant factor in this decision.

31. Having weighed up the above factors, on balance, I am satisfied disclosure of certain third party personal affairs information would be unreasonable in the circumstances, and this information is exempt from release under section 33(1).
32. However, where the information relates to Agency officers in the context of carrying out their professional duties or responsibilities and the nature of their activities, I am satisfied disclosure of this information would not be unreasonable in the circumstances.
33. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 33(1).

Section 25 – Deletion of exempt or irrelevant information

34. Section 25 requires an agency to grant access to an edited copy of a document where it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
35. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’¹⁴ and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not ‘practicable’, and release of the document is not required under section 25.¹⁵
36. I have considered whether it is practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25. I am satisfied it is practicable to do so as it would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

37. While I am satisfied certain information in the documents is exempt from release under section 33(1), I am not satisfied the information is exempt under section 30(1).
38. As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt information deleted in accordance with section 25, access is granted in part.

¹² Section 33(2A).

¹³ Section 33(2A).

¹⁴ *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 at [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

¹⁵ *Honeywood v Department of Human Services* [2006] VCAT 2048 at [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140] and [155].

39. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

40. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁶
41. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁷
42. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁸
43. Information about how to apply to VCAT is available online at www.vcat.vic.gov.au. Alternatively, VCAT may be contacted by email at admin@vcat.vic.gov.au or by telephone on 1300 018 228.
44. The Agency is required to notify the Information Commissioner in writing as soon as practicable if either party applies to VCAT for a review of my decision.¹⁹

Third party review rights

45. As I have determined to release documents that contain the personal affairs information of third parties, if practicable, I am required to notify those individuals of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.²⁰
46. In this case, I am satisfied it is practicable to notify the relevant third parties of their review rights and confirm they will be notified of my decision on the date of decision.

When this decision takes effect

47. My decision does not take effect until the third parties' 60 day review period expires.
48. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁷ Section 52(5).

¹⁸ Section 52(9).

¹⁹ Sections 50(3F) and 30 (3FA).

²⁰ Sections 49P(5), 50(3) and 52(3).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	FOI request form	6	Release in full	Not subject to review	
2.	[date]	FOI request	1	Release in full	Not subject to review	
3.	[date]	FOI request query	1	Release in full	Not subject to review	
4.	[date]	Email FW: [name] – Yooralla – [reference number] – Probation – Show Cause [initials]	4	Release in full	Not subject to review	
5.	[date]	Letter to [initials]	2	Release in full	Not subject to review	
6.	[date]	Letter to [initials]	2	Release in full	Not subject to review	
7.	[date]	Letter to [initials] Investigation Outcome	2	Release in full	Not subject to review	
8.	[date]	Letter to [initials] Investigation	2	Release in full	Not subject to review	

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
9.	[date]	Probation – Show Cause	2	Release in full	Not subject to review	
10.	[date]	Voice Mail [name]	N/A	Release in full	Not subject to review	
11.	[date]	Redacted statement	4	Release in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released, except for exempt information as recorded in the marked-up version of the document provided to the Agency with this decision, which is to be deleted in accordance with section 25.	Section 33: I am satisfied that the document contains personal affairs information which would be unreasonable to disclose where it has been provided in confidence and may not be known to the Applicant, is related to a third party's medical information or is related to an Agency officer in a personal capacity. This information is exempt under section 33(1). Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25.
12.	[date]	Redacted Incident report	2	Release in part Section 33(1)	Release in part Sections 33(1), 25	Section 33(1): I am not satisfied that it would be unreasonable to disclose the names of persons who investigated the matter or had a decision-making capacity or

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					The document is to be released, except for exempt information as recorded in the marked-up version of the document provided to the Agency with this decision, which is to be deleted in accordance with section 25.	procedural information about the response to the complaint. Accordingly, they are not exempt under section 33(1). I am satisfied that it would be unreasonable to disclose the personal affairs information of the incident victim as I consider this to be sensitive in nature. Section 25: See comments for Document 11.
13.	[date]	Resignation letter	1	Release in full	Not subject to review	
14.	[date]	Riskman 1 Redacted	3	Release in part Sections 30(1), 33(1)	Release in part Sections 33(1), 25 The document is to be released, except for exempt information as recorded in the marked-up version of the document provided to the Agency with this decision, which is to be deleted in accordance with section 25.	Section 30(1): I consider that the information is factual in nature. Accordingly, it is not exempt under section 30(1). Section 33(1): I am not satisfied that it would be unreasonable to disclose the names of persons who investigated the matter or had a decision-making capacity. Accordingly, they are not exempt under section 33(1). I am satisfied it would be unreasonable to disclose their contact numbers and

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
						therefore the exemption in 33(1) applies to this information. Section 25: See comments for Document 11.
15.	[date]	Riskman 2 Redacted	3	Release in part Sections 30(1), 33(1)	Release in part Sections 33(1), 25 The document is to be released, except for exempt information as recorded in the marked-up version of the document provided to the Agency with this decision, which is to be deleted in accordance with section 25.	Sections 30(1) and 33(1): See comments for Document 14. Section 25: See comments for Document 11.
16.	[date]	Statement – marked up	4	Release in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released, except for exempt information as recorded in the marked-up version of the document provided to the Agency with this decision, which is to be deleted in	Section 33(1): See comments for Document 11.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					accordance with section 25.	
17.	[date]	Incident Report – marked up	2	Release in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released, except for exempt information as recorded in the marked-up version of the document provided to the Agency with this decision, which is to be deleted in accordance with section 25.	Section 33(1): See comments for Document 12.
18.	[date]	Riskman 1 – marked up	3	Release in part Sections 30(1), 33(1)	Release in part Sections 33(1), 25 The document is to be released, except for exempt information as recorded in the marked-up version of the document provided to the Agency with this decision, which is to be deleted in accordance with section 25.	Sections 30(1) and 33(1): See comments for Document 14.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
19.	[date]	Riskman 2 – marked up	3	Release in part Sections 30(1), 33(1)	Release in part Sections 33(1), 25 The document is to be released, except for exempt information as recorded in the marked-up version of the document provided to the Agency with this decision, which is to be deleted in accordance with section 25.	Sections 30(1) and 33(1): See comments for Document 14.
20.	[date]	FOI request	1	Release in full	Not subject to review	
21.	[date]	Foi request	1	Release in full	Not subject to review	
22.	[date]	RE_[name].msg	1	Release in full	Not subject to review	
23.	[date]	History of ticket #[reference number]	1	Release in full	Not subject to review	
24.	[date]	Probation Show Cause	2	Release in full	Not subject to review	
25.	[date]	[name] – Yooralla – [ID number] –	1	Release in full	Not subject to review	

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
		Probation – Show Cause AD				
26.	[date]	[name] letter of search and response to questions	3	Release in full	Not subject to review	